Supreme Court, U.S.
FILED
SEP 27 1996
CLERK

No. 96-269

In The

Supreme Court of the United States

October Term, 1995

KOCH FUELS, INC.,

Petitioner,

v.

R. GARY CLARK, in his capacity as Tax Administrator for the State of Rhode Island,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Rhode Island

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF THE PETITIONER

The Respondent has raised three essential arguments in opposition to Petitioner's request for certiorari. First, Respondent suggests that the matter is moot because the pertinent Rhode Island statute has been repealed. Second, Respondent argues that no conflict exists between the Rhode Island Supreme Court's decision in this matter and the decisions of other state courts regarding whether substantial physical presence is required to establish sufficient Commerce Clause nexus under the first prong of this Court's four-part test established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Finally, Respondent attempts to characterize this Court's recent holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), as simply based on "stare decisis" and thus somehow less worthy of adherence. None of the Respondent's positions are persuasive. Indeed, upon closer scrutiny, each of the Respondent's arguments emphasizes the compelling reasons this Court should grant certiorari and review the decision of the Rhode Island Supreme Court.

I.

Respondent argues that certiorari should be denied because the statute, under which Rhode Island collected a sales or use tax from Koch, has been repealed. This argument is incorrect for two fundamental reasons.

First, the State of Rhode Island has collected some $366,000 from Koch, which has been contested as an unconstitutional tax. A case or controversy still exists despite the repeal of taxing statute. This Court recently found in *Fulton Corp. v. Faulkner*, ___ U.S. ___, 116 S. Ct. 848, 852 n. 1 (1996), that repeal of a state taxing statute which has no retroactive effect does not render a claim for refund moot. The cases relied upon by Respondent for its observation that this Court has, at times, denied certiorari where a statute has been repealed do not apply where a case or controversy continues to exist. *See, e.g., United States v. Abrams*, 344 U.S. 855 (1952); *Community Servs., Inc. v. United States*, 342 U.S. 932 (1952).

Second, the Respondent's argument that the repeal of the statute dictates that the Court deny certiorari ignores the fact that,

despite this Court's clear and unequivocal opinion in *Quill Corporation*, states (like Rhode Island) may continue in their efforts to devise ways to impose sales or use taxes on out-of-state vendors whose only connection with the state is by common carrier. However, when this Court upheld the bright-line physical presence requirement in *Quill Corporation*, the Court expressly desired to encourage "settled expectations" and "foster investment." 504 U.S. at 316. The holding of the Rhode Island Supreme Court in formulating a "practical" physical presence test can and will be relied upon by other states and local taxing authorities to circumvent the actual physical presence requirement established by this Court and will therefore contribute to a climate of unsettled expectations in the area of sales and use taxation. The Rhode Island Supreme Court's decision, therefore, has the likely potential to impact more than the litigants to this proceeding.[1]

II.

The Respondent struggles to convince this Court that the decision of the Rhode Island Supreme Court is consistent with the decisions of other state courts on the issue of the physical presence requirement imposed by the Commerce Clause for sales or use taxes. Neither the attempts to distinguish cases cited by Koch nor the citations of other cases supposedly consistent with the Rhode Island Supreme Court's decision are at all persuasive. The stark fact remains that the Rhode Island Supreme Court held that a sales or use tax can be imposed upon Koch when Koch's only connection with Rhode Island was by use of a common carrier. The decision of the Rhode Island Supreme Court is renegade from this Court's holding in *Quill Corporation*, a fact revealed by the

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[1] The Respondent's heavy reliance on *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), is misplaced in this context. In *Rice*, an intervening state statute was brought to the Court's attention which resolved the dispute between the litigants and made unlikely any future such dispute. In the instant matter, however, repeal of the Rhode Island statute neither resolves Koch's dispute with Rhode Island nor prohibits other states or local taxing authorities from improperly de-emphasizing the physical presence requirement under the Commerce Clause.

inconsistency of the Rhode Island Supreme Court's decision with similar cases from other states.

Respondent attempts to distinguish recent state court decisions holding that the taxpayer had an insufficient physical presence to subject it to sales or use taxes under the Commerce Clause. *See, e.g., SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); *Pledger v. Troll Book Clubs, Inc.*, 871 S.W.2d 389 (Ark. 1994); *Florida Dept. of Revenue v. Share Int'l*, 667 So.2d 226 (Fl. Dist. Ct. App. 1995), *aff'd*, 676 So.2d 1362 (Fla. 1996). While Respondent points to some cosmetic distinctions between these post-*Quill Corporation* decisions and that of the Rhode Island Supreme Court, Respondent cannot mask the true distinction – namely that these other decisions correctly held that where the taxpayer does not have a physical presence under a bright-line test, the taxpayer cannot be subject to a state sales or use tax. Because Koch had no physical presence in Rhode Island, the imposition of any sales or use tax is impermissible, and the Rhode Island Supreme Court should have so held.

Next, Respondent proffers a number of pre-*Quill Corporation* decisions as supposedly consistent with that of the Rhode Island Supreme Court. *See, e.g., Good's Furniture House, Inc. v. Iowa State Bd. Of Tax Review*, 382 N.W.2d 145 (Iowa), *cert. denied*, 479 U.S. 817 (1986); *Matter of State Sales or Use Tax Liability of Webber Furniture*, 290 N.W.2d 865 (S.D. 1980); *Rowe-Genereux, Inc. v. Vermont Dept. of Taxes*, 411 A.2d 1345 (Vt. 1980). Putting aside that all of these cases pre-date *Quill Corporation*, the Court can still determine even from Respondent's description of these cases that, in each, the taxpayer had an actual, physical presence in the taxing state. In the cases cited by Respondent, the taxpayer traveled into the taxing state to make deliveries in their own trucks, performed installations or made service calls, and used in-state media for advertisement purposes. Koch did none of these things, and the Rhode Island Supreme Court so found. These facts alone not only distinguish Respondent's cited cases from the decision of the Rhode Island Supreme Court, but also highlight the key constitutional distinction which Respondent is either unable or unwilling to grasp – an actual physical presence in a state as opposed to completion of an out-of-state sale through use of a common carrier.

III.

Oddly, the Respondent saves for last its argument that certiorari should be denied on the ground that the Rhode Island Supreme Court's decision is not inconsistent with this Court's decision in *Quill Corporation*. As Koch pointed out in its petition, this argument is wrong precisely because the Rhode Island Supreme Court's decision not only cannot be reconciled with *Quill Corporation* but also constitutes an end-run to a conclusion expressly prohibited by *Quill Corporation*.

Respondent attempts to downplay the significance of *Quill Corporation* by arguing, contrary to the majority's opinion, that the holding in that case was based on *stare decisis* grounds alone. Koch disagrees. First, while this Court did rely on *stare decisis* as a ground for affirming the bright-line physical presence test, the decision in *Quill Corporation* contained a discussion on the merits, contrary to Respondent's position. 504 U.S. at 314-17.[2] Second, even if *Quill Corporation* was grounded solely on *stare decisis*, Rhode Island is bound by its holding and is not at liberty to ignore pertinent authority from the United States Supreme Court and to decide matters differently.

Next, Respondent recites the basic facts which purportedly supported the Rhode Island Supreme Court's determination that Koch had "in practical effect" a physical presence in Rhode Island. Respondent's recitation is unconvincing because it lists nothing more than terms typically agreed to by companies using common carriers. However, *Quill Corporation* makes clear that, absent some other factors indicating physical presence, an out-of-state seller's use of a common carrier does not, by its own terms, constitute a physical presence in a state. The Respondent also argues that the Rhode Island Supreme Court's finding that the tax is fairly related to services Koch received should support a finding of physical presence. This argument impermissibly collapses two of the four separate constitutional requirements of *Complete Auto* into one,

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[2] Indeed, Justices Scalia, Kennedy and Thomas concurred in the judgment but dissented as to part of the opinion on the ground that they "would not revisit the merits of that holding but would adhere to it on the basis of stare decisis." 504 U.S. at 320.

which they are not. In any event, the Rhode Island Supreme Court was mistaken in its finding on the fourth requirement under *Complete Auto*. None of the so-called benefits enunciated flowed to Koch; rather, they flowed to the common carrier, for whose services Koch was already paying. Thus, Respondent's attempt to boot-strap the discussion under the fourth prong of the *Complete Auto* test as also supporting the first prong, that of physical presence, should be accorded no weight.[3]

Rhode Island's collection of a sales or use tax from Koch constituted an unconstitutional tax under the Commerce Clause of the United States Constitution. The Rhode Island Supreme Court's decision directly conflicts with this Court's recent decision in *Quill Corporation* and should be reviewed to correct that error. Even more importantly, this Court should grant certiorari to put the issue of physical presence for sales or use tax purposes to rest once and for all so that the settled expectations recognized in *Quill Corporation* can be realized and so that the wide-spread efforts to the contrary will abate.

Respectfully submitted,

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[3] Finally, Respondent makes much in its Opposition of the finding of the Tax Administrator that Koch "filed business corporation taxes in Rhode Island for the years 1982, 1983, and 1984." Pet. App. at 3. Koch took the position in the proceedings below that these filings were in error. Pet. App. at 16. In any event, these income tax filings do not constitute consent on the part of Koch to sales or use taxation by Rhode Island, nor do they legally constitute a physical presence in the state of Rhode Island. The test under *Quill Corporation* remains one of actual physical presence which cannot be created, or consented to, by filings with a state where the taxpayer has no physical presence.